Supreme Court, U. S.
FILED
MAY 24 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6219

THOMAS BALDASAR,

Petitioner,

—*v.*—

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

PETITION FOR CERTIORARI FILED FEBRUARY 18, 1978
CERTIORARI GRANTED MARCH 19, 1979

Supreme Court of the United States

OCTOBER TERM, 1978

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THOMAS BALDASAR,

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—*v.*—

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CHRONOLOGICAL LIST OF RELEVANT DATES ON WHICH PLEADINGS WERE FILED, HEARINGS HELD, AND ORDERS ENTERED

December 23, 1975—Information filed.

January 14, 1976—Arraignment.

July 26, 1976—Jury trial commenced.

July 27, 1976—Jury returned guilty verdict.

August 16, 1976—Sentencing hearing held; Petitioner Baldasar sentenced to a one to three year term of imprisonment.

September 8, 1976—Notice of appeal filed.

August 30, 1977—Opinion of the Appellate Court of Illinois, Second Judicial District.

November 23, 1977—Petition for Leave to Appeal denied by the Supreme Court of Illinois.

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, DUPAGE COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

—*vs.*—

THOMAS O. BALDASAR, DEFENDANT

No. 75-5637-G

INFORMATION

Filed December 23, 1975

JOHN J. BOWMAN, State's Attorney in and for the County of DuPage, State of Illinois, by J. MICHAEL JAMES, Assistant State's Attorney, now appears before the Circuit Court of the 18th Judicial Circuit, and in the name and by the authority of the PEOPLE OF THE STATE OF ILLINOIS, states that THOMAS O. BALDASAR, did on the 13th day of November, 1975, at and within DuPage County, Illinois, commit the offense of THEFT in that he did knowingly exert unauthorized control over property of Montgomery Ward and Co., Inc., being one Dial Massage, having a total value of less than $150.00, intending to deprive Montgomery Ward and Co., Inc., permanently of the use and benefit of said property. That said defendant was previously convicted of theft on May 1, 1975, in violation of Illinois Revised Statutes 1974, Chapter 38, Section 16-1(a)(1), and AGAINST THE PEACE AND DIGNITY OF THE SAME PEOPLE OF THE STATE OF ILLINOIS.

JOHN J. BOWMAN
State's Attorney

BY: /s/ J. Michael James
Assistant State's Attorney
(Jurat omitted in printing)

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, DUPAGE COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

—*vs.*—

THOMAS O. BALDASAR, DEFENDANT

No. 76-5637-G

MOTION

Filed July 27, 1976

The defendant, THOMAS O. BALDASAR, moves that the Certified Copy of Conviction of a Thomas Baldasar dated 5/1/75 not be admitted into evidence for the following reasons:

1. The name of the two defendants are not identical. *People* v. *Connell*, 286 N.E. 2d 565 (1972) states that a "certified copy of alleged prior conviction for theft on which name similar to defendant's was not proof beyond a reasonable doubt of prior conviction for purposes of imposing felony theft."
2. There has been no affirmative showing that the defendant was represented by counsel. *People* v. *Dixon*, 46 Ill. 2d 496, 263 N.E. 2d 876, 878 (1970). *People* v. *Thompson*, 48 Ill. 2d 41, 268 N.E. 2d 369, 371 (1971).

Respectfully submitted,

FRANK WESOLOWSKI, JR.
DuPage County Public Defender

BY: /s/ Carol Anfinson
Deputy Public Defender

IN THE CIRCUIT COURT OF DUPAGE COUNTY
FOR THE EIGHTEENTH JUDICIAL CIRCUIT
OF ILLINOIS

TRIAL TRANSCRIPT AND PROCEEDINGS
CONDUCTED JULY 27, 1976

PRESENT:
FOR THE PEOPLE OF THE STATE OF ILLINOIS:
JOHN J. BOWMAN
State's Attorney, By
Andres J. Eglitis
Assistant State's Attorney

FOR THE DEFENDANT:
CAROL ANFINSON
Assistant Public Defender

TESTIMONY OF SOL VALIERY
DIRECT EXAMINATION
BY: MR. EGLITIS

[R. 46] Q. Mr. Valiery, would you state your name, please, and spell your last name for the Court record?
A. Sol Valiery, V-a-l-i-e-r-y.
Q. What is your occupation, sir?
A. Perishable manager, Jewel Food Stores.
Q. Where are you presently employed?
A. 5534 Cermak in Cicero.
Q. Mr.—is it Valiery?
A. Right.
Q. Mr. Valiery, calling your attention to April 8th, 1975, where were you employed on that date?
A. 2001 West Roosevelt Road, Broadview, Illinois.
Q. What sort of an establishment were you employed in at that time?
A. A Jewel Food Store, as store manager.
Q. You were the store manager?
A. Right.

Q. I call your attention to April 8th, 1975. Do you recall anything unusual happening in that store on that date?
A. Yes. Mr. Baldasar was in my store.
I apprehended him after observing him put [R. 47] three pounds of bacon under his pants.
MS. ANFINSON: Objection. This is really irrelevant.
THE COURT: That may be stricken, as to what he saw.

BY MR. EGLITIS:

Q. Mr. Valiery, calling your attention, if I may to May 1st, 1975, do you recall that day?
A. Yes, I do.
Q. Where were you on that day?
A. In the Oak Park Village Hall court room.
Q. Why were you there at that particular time?
A. Testifying against Mr. Baldasar in court.
Q. Do you see that person in court today?
A. Yes, I do.
Q. Would you point him out to the Court, please, and tell the Court where he is sitting and what he is wearing, for the Court record?
A. He is sitting directly in front of me wearing a red shirt.
Q. Is that the same person who you observed in your store on April 8th, 1975?
MS. ANFINSON: Again objection, Judge.
That is irrelevant.
THE COURT: Sustained.

BY MR. EGLITIS:

[R. 48] Q. Mr. Valiery, is the person you have just identified the same person whom you observed in court on May 1st, 1975?
A. Yes, he is.
Q. What was Mr. Baldasar doing in that court room on that date, if you know?
A. He was appearing on charges of shop lifting.
Q. Did you testify in that case?
A. Yes, I did.

Q. At that time, Mr. Valiery, did you identify Mr. Baldasar?

A. Yes, I did.

Q. It that the same person who is in the court room now, that you identified on May 1st of 1975?

A. Yes, it is.

Q. You testified at the trial. Is that correct?

A. Yes, I did.

Q. Did you hear—strike that

Was that a bench trial or a jury trial?

A. A bench trial.

Q. Do you recall what if any decision the judge made in that particular case in May 1st, 1975, in Oak Park?

A. Guilty, and fined $159.

MR. EGLITIS: Mr. Reporter, would you please mark this [R. 49] People's Exhibit No. 3 for identification.

(The document was thereupon marked People's Exhibit No. 3 for identification.)

BY MR. EGLITIS:

Q. Mr. Valiery, I show you what has been marked People's Exhibit No. 3 for identification. Would you examine that document, please, and tell the Court if you recognize it and if you do recognize it what is it?

A. Yes, I recognize it.

Q. What do you recognize that to be?

A. This is the statement of the—

MR. ANFINSON: Judge, if he is looking at a Court record, I would say he is incompetent to testify what that Court record is.

THE COURT: Sustained.

MR. ANFINSON: I don't know what he is looking at.

BY MR. EGLITIS:

Q. Did you sign a complaint in that case, Mr. Valiery?

A. Yes, I did.

Q. Do you recognize your signature any place on this document, People's Exhibit No. 3?

A. Yes. It is right here.

Q. That is your signature?

A. Yes, it is.

[R. 50] MR. EGLITIS: Have you seen this, Counsel?

MS. ANFINSON: Are you referring to the complaint?

MR. EGLITIS: To the whole thing.

MS. ANFINSON: Yes, I have.

MR. EGLITIS: Your Honor, I would seek at this time to introduce into evidence what has been marked People's Exhibit No. 3 for identification, purporting to be a certified copy of a half-sheet from the Court records of the Circuit Court of Cook County for the Municipal District of Oak Park, Illinois.

THE COURT: Is there any objection?

MS. ANFINSON: Yes, Judge.

I have a motion at this point.

THE COURT: All right.

(Whereupon the following further proceedings were had herein, in chambers, outside the presence and hearing of the jury, to-wit:)

MS. ANFINSON: Judge, first, you will notice on the complaint they have his name wrong.

Furthermore, there has been no affirmative showing that the defendant was represented by counsel, which is required by People versus Dixon and People versus Thompson, to be effective, under the Recidivist Statute.

It is the same sort of reasoning.

[R. 51] THE COURT: Do you have the Illinois citation?

MS. ANFINSON: Yes. People vs. Dixon, 46 Illinois 2nd, 502.

I am referring to the second paragraph, Judge.

As for the first paragraph, I didn't anticipate that they would have the person in court to testify.

The certified copy does not have exactly the same name on it.

But I am referring to the second paragraph.

THE COURT: In other words, you state that since he was not represented by counsel—

MS. ANFINSON: I state beyond that, there there is no affirmative showing that he was represented by counsel.

I know that the testimony will show that he wasn't represented by counsel, but at this time there is no affirmative showing that he was, as is required by those two cases.

Also the same sort of reasoning is found in Burgett vs. Texas, which is that under the Recidivist Statute you must show that in the original case he was represented by counsel.

THE COURT: I don't see anything in the headnotes in this case on that point.

MS. ANFINSON: Since I researched it myself, I am [R. 52] pretty sure I am right.

I will have to read it through. It has been a while.

The other one is probably the clearer case, on page 41, People vs. Thompson.

It talks about the affirmative showing—they actually don't discuss it, but they do talk about no affirmative showing in the conviction statement that the defendant was represented by counsel or waived counsel.

MR. EGLITIS: They don't decide the question.

MS. ANFINSON: They don't decide the question, but I cite this case because it does illustrate the point.

THE COURT: "A further claim is made that the conviction statement which forms the basis for the enhanced penalty failed to show that the defendant was represented by counsel at the time of the former conviction.

". . . . defendant contends that this defect renders the present conviction invalid. On the basis of the original record there would be merit to defendant's claim. However, a supplemental record has been filed showing that defendant was represented by counsel at the [R. 53] time of his prior conviction."

MS. ANFINSON: They cured that in that case by showing later that he was represented by counsel.

However, originally there was no affirmative showing, so in fact the Court said that that does have merit.

The reason it was cured was by the later showing after the trial that he did have counsel.

THE COURT: Of course, that was a felony case.

MS. ANFINSON: This is also a felony charge.

The original case was not. That is true.

The original case was a misdemeanor.

THE COURT: On that basis I don't think the Supreme Court case applies.

MS. ANFINSON: However, it was a Class A misdemeanor, which does carry a possible penalty of a year in jail.

THE COURT: That is right, but it is not a felony.

On the basis of it not being a felony, I will deny your motion.

MR. EGLITIS: Your Honor, again at this time I move to admit the exhibit into evidence.

The Circuit Court of Cook County has attached to the certified copy of the half-sheet a copy of the complaint.

[R. 54] If Counsel has no objection to the copy of the complaint which states the facts of the first theft, I would be willing to agree to remove that and just enter the half-sheet, if the Court feels it is prejudicial.

MS. ANFINSON: I would just as soon leave it on.

MR. EGLITIS: Fine. I will leave it on.

THE COURT: Okay. That settles that.

MS. ANFINSON: I have a certified copy of that complaint.

THE COURT: All right. Now, this will be filed. Is that correct?

MS. ANFINSON: Yes.

(Whereupon the following further proceedings were had herein, in open court, in the presence and hearing of the jury, to-wit:)

MR. EGLITIS: May I proceed, your Honor?

THE COURT: Yes. Let the record show that People's Exhibit No. 3 will be admitted.

(The document was thereupon received in evidence, marked People's Exhibit No. 3.)

MR. EGLITIS: Thank you, your Honor.
The State has nothing further from this witness.
Thank you, Mr. Valiery.
[R. 55] THE COURT: Just a moment, sir.
You may cross examine.

CROSS EXAMINATION

BY MS. ANFINSON:

Q. You were present in the Oak Park Village court hours when Mr. Baldasar was convicted. Is that correct?
A. Yes.
Q. Was he represented by counsel at that time?
A. No, he wasn't.
Q. What was the theft that he was convicted of?
A. Three pounds of bacon.
Q. Is that the same as three packages of bacon?
A. Yes.
MS. ANFINSON: I have no further questions.
MR. EGLITIS: I have nothing further, your Honor.
THE COURT: You may step down.

(Witness excused.)

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, DUPAGE COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

—*vs.*—

THOMAS O. BALDASAR, DEFENDANT

No. 75-5637-G

PEOPLE'S EXHIBIT NUMBER 3

[Stationary Seal and caption omitted in printing]

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINIOS
FOURTH MUNICIPAL DISTRICT

Case Number(s)

75 MC 4-51968

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

THOMAS BALDASAR, DEFENDANT(S)

I, Morgan M. Finley, Clerk of the Court and Keeper of the records and files thereof in the Fourth Municipal District, Circuit Court of Cook County, Illinois, do hereby certify the attached is a true, perfect, and complete copy of a certain Memorandum commonly called a Half-Sheet and Order, the original of which is now in my possession.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Court at Oak Park, Illinois, this 13th day of January, A.D. 1976.

,'s/ MORGAN M. FINLEY

[SEAL]

655 Lake Street
Oak Park, Illinois 60301
(848-9830)

405
(Court Branch)

05-01-75
(Court Date)

CLERK OF THE CIRCUIT COURT OF
COOK COUNTY MISDEMEANOR

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

COMPLAINT

No. ———

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

v.

THOMAS M. BALDASAR, DEFENDANT

Sol E. Valiery (For Jewel Tea Co,) complaint, now appears before The Circuit Court of Cook County and states that

Thomas M. Baldasar has, on or about April 8, 1975 at 2001 Roosevelt Rd., Broadview committed the offense of Theft in that he did knowingly exert unauthorized control over property of the Jewel Tea Co., being three packages of bacon, having a total value of less than $50.00, with the intent to deprive said Jewel Tea Co. permanently of the use and benefit of said property.

in violation of Chapter 38 Section 16-1a1

ILLINOIS REVISED STATUTES

/s/ Sol Valiery
SOL E. VALIERY
2001 Roosevelt Rd.
Broadview 865-9206

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

/s/ Sol Valiery

Subscribed and sworn to before me 04-07-75, 19—.

/s/ Morgan M. Finley
by [illegible signature]

I have examined the above complaint and the person presenting the same and have heard evidence thereon, and am satisfied that there is probable cause for filing same. Leave is given to file said complaint.

Summons issued, Judge

or Bail set at $1,000.00

Warrant Issued, Judge Rule of Court

or

Bail set at Judge

No. 75 MC 4-51968

THE PEOPLE OF THE STATE OF ILLINOIS

—*vs.*—

THOMAS BALDASAR

THEFT

violation 38 16-1-A-1

PAPERS FILED AND WRITS ISSUED

Date		
4-8-75		Information filed D 75 81609 $1000 10% 100
Date	Judge	Orders Entered
5-1-75	Cawley	Leave to file Complaint. Bail $ Court takes jurisdiction of defendant in court on complaint filed. /s/ PNG JW F/G /s/ 1 Year Probation /s/ $159.00 X 10 SOM 5-15-75
5-15-75	Cawley	/s/ Judgment Satisfied $159 X 10

[DuPage County Clerk's Certification of Exhibit to Appellate Court Omitted in Printing.]

IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS

IN THE EIGHTEENTH JUDICIAL CIRCUIT, DU PAGE COUNTY, WHEATON, ILLINOIS

STATE OF ILLINOIS)
) ss MITTIMUS FOR STATE
COUNTY OF DUPAGE) PENAL INSTITUTIONS

PLEAS, before the Eighteenth Judicial Circuit Court, held in the City of Wheaton on August 16, 1976.

PRESENT: The HONORABLE ALFRED E. WOODWARD Judge of the 18th Circuit Court

JOHN J. BOWMAN States Attorney of DuPage County

WAYNE S. SHIMP Sheriff of DuPage County

ATTEST: JOHN W. COCKRELL, Clerk of the Eighteenth Judicial Circuit Court

BE IT REMEMBERED that on said date the following among other proceedings, were had and entered of record in said Court:

Case No. 75-5637-G

Filed August 16, 1976

THE PEOPLE OF THE STATE OF ILLINOIS

—versus—

THOMAS O. BALDASAR, DEFENDANT

JUDGMENT AND SENTENCE

Now comes THE PEOPLE OF THE STATE OF ILLINOIS by JOHN J. BOWMAN, States Attorney of

DuPage County by ANDY EGLITIS Assistant States Attorney, and the defendant, in person and by counsel, CAROL ANFINSON and now neither the defendant nor defendant's counsel saying anything further why judgment of the Court should not now be pronounced against the defendant on the (*VERDICT*) of guilty heretofore entered to the charge of THEFT UNDER $150 CHAPTER 38 SECTION 16-1(A)(1) (FELONY—SECOND CONVICTION) as charged in the *information* or returned in this cause on December 23, 1975.

THEREFORE, IT IS ORDERED AND ADJUDGED by the Court that the said defendant is guilty of the crime of THEFT UNDER $150 (FELONY—SECOND CONVICTION)

The Court finds the age of the said defendant to be 28 years.

The Court having offered to hear evidence in aggravation and mitigation of the offense as to the moral character, life, family, occupation, and criminal record of the defendant, and the presentation of evidence having been heard by the Court. The defendant having nothing further to say, the Court sentences Defendant to imprisonment in a [X] STATE PENITENTIARY [ ] CORRECTIONAL INSTITUTION and fixes the term of imprisonment at NOT LESS THAN ONE (1) YEAR NOR MORE THAN THREE (3) YEARS

IT IS FURTHER ORDERED AND ADJUDGED that the defendant be taken from the bar of this Court to the common jail of DuPage County, and from there to be taken by the Sheriff of DuPage County to

[ ] VANDALIA CORRECTIONAL CENTER at Vandalia, Illinois

[X] DIAGNOSTIC CENTER, STATEVILLE PENITENTIARY, at Joliet Illinois and be delivered to the Department of Corrections, and said Department of Corrections is hereby commanded to confine the defendant

for the term above fixed, or until discharged by due process of law. IT IS FURTHER ORDERED that the said defendant pay the costs of these proceedings and a mittimus be issued and executed without delay.

[Jurat Omitted].

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

No. 76-535

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

—*vs.*—

THOMAS BALDASAR, DEFENDANT-APPELLANT

Appeal from the Circuit Court of
DuPage County, Illinois

Honorable Alfred E. Woodward, Presiding Judge

OPINION

FILED AUGUST 30, 1977

Mr. JUSTICE NASH delivered the opinion of the court:

Defendant, Thomas O. Baldasar, after trial by jury, was convicted of theft of property not exceeding $150 in value, as a second offense, a Class 4 felony (Ill. Rev. Stat. 1973, ch. 38, pars. 16-1(a)(1), 16-1(e)(1)) and was sentenced to a term of one to three years in the penitentiary.

The primary issue on this appeal is whether defendant's prior, uncounseled misdemeanor theft conviction could constitutionally be considered so as to elevate the present misdemeanor theft offense to a felony thereby increasing the possible penalty which might be imposed upon conviction. Defendant contends the holding of *Argersinger* v. *Hamlin* (1972), 407 U.S. 25, 32 L. Ed. 2d 530, 92 S. Ct. 2006, bars such consideration. We do not agree.

In May 1975 defendant was convicted after bench trial of a misdemeanor theft and was sentenced to a one-year term of probation and fined $159. There is evidence he was not represented by counsel in that trial and no evi-

dence that defendant waived his right to counsel at that time. The present case was tried in August 1976 on an information in which the first petty theft conviction was alleged and proved at trial in order to invoke the enhanced penalty provisions of the Criminal Code provided for such recidivist conduct. (Ill. Rev. Stat. 1973, ch. 38, par. 16-1(e)(1).) As a consequence, after conviction, defendant was sentenced to the penitentiary for conduct for which the maximum penalty would have been a term of less than one year in a penal institution other than a penitentiary except for the enhanced penalty made possible by defendant's prior theft conviction.

In *Argersinger*, that defendant was convicted of a misdemeanor after a trial conducted without counsel, where he had not waived his right to counsel, and he was sentenced to a term of 90 days in jail. In voiding that conviction, the United States Supreme Court stated,

> "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." (407 U.S. 25, 37, 32 L. Ed. 2d 530, 538, 92 S. Ct. 2006, 2012.)

Defendant contends that he has been imprisoned in the present case as a direct or collateral result of his prior uncounseled conviction, and the mandate of *Argersinger* has now been violated in that the earlier conviction was applied to enhance the penalty imposed for his subsequent theft conviction.

Defendant concedes that his earlier 1975 theft conviction was itself valid under *Argersinger*. While he was not represented by counsel in that trial, he also was not imprisoned after being convicted of that theft offense. The penalty then imposed for that offense of probation and a fine left that case in the category recognized but not passed upon by the court in *Argersinger* where it stated,

> "We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail." 407 U.S. 25, 37, 32 L. Ed. 2d 530, 538, 92 S. Ct. 2006, 2012.

In *Argersinger*, the court held that no person may be imprisoned for any offense, petty, felony or misdemeanor, unless he is represented by or has effectively waived his right to counsel at trial. It directed itself only to cases wherein an uncounseled defendant had been convicted of a criminal offense and was then sentenced to imprisonment for that offense and that conviction. There is no language in the opinion suggesting a prospective application or readjudication of a defendant's right to counsel should he be convicted in the future of the commission of another offense and be then subject to another sentence. The notion that repeat offenders are subject to enhanced penalties for their conduct is so basic to our criminal justice system that it could not have escaped the notice of the *Argersinger* court. Yet, it carefully limited its holding to a conviction and the sentence imposed for that conviction.

The limited scope of *Argersinger* is further expressed in its statement that,

> "The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy." (407 U.S. 25, 40, 32 L. Ed. 2d 530, 540, 92 S. Ct. 2006, 2014.)

The "run of misdemeanors" would, indeed, be affected if we were to accept defendant's argument that the *Argersinger* court intended by the phrase "end up" or any other language to have contemplated its application to the facts in the instant case. In addition to the second or subsequent offense sentencing provision in our theft statute, with which we are directly concerned here, there are at least 10 similar enhanced penalty statutes which could not then be applied against the repeat offender they are designed to affect even though his earlier con-

victions met the *Argersinger* requirements as in the instant case.[1]

While Illinois courts of review have previously considered applications of *Argersinger* in various contexts (*City of Danville* v. *Clark* (1976), 63 Ill. 2d 408, 348 N.E.2d 844, *cert. denied* (1976), 429 U.S. 899, 50 L. Ed. 2d 184, 97 S. Ct. 266; *People* v. *Morrissey* (1972), 52 Ill. 2d 418, 288 N.E.2d 397; *People* v. *Coleman* (1972), 52 Ill. 2d 470, 288 N.E.2d 396; *People* v. *Scott* (1976), 36 Ill. App. 3d 304, 343 N.E.2d 517; *People* v. *Kerner* (1975), 32 Ill. App. 3d 676, 336 N.E.2d 65; *People* v. *Schultz* (1974), 21 Ill. App. 3d 1086, 316 N.E.2d 183; *People* v. *Bailey* (1973), 12 Ill. App. 3d 779, 301 N.E.2d 481), none have decided the question we are presented in this case. Of those few states which have considered similar questions concerning the extension of *Argersinger*, five would tend to support defendant's position herein while two would reject it. The former include: *City of Monroe* v. *Fincher* (La. 1974), 305 So. 2d 108; *Alexander* v. *State* (1975), 258 Ark. 633, 527 S.W.2d 928; *Commonwealth* v. *Barrett* (Mass. App. 1975), 322 N.E.2d 89; *Maghe* v. *State* (Okla. Crim. App. 1973), 507 P.2d 950; and *State* v. *Kirby* (1972), 33 Ohio Misc. 48, 62 Ohio Op. 2d 25, 289 N.E.2d 406; and the latter are *Aldrighetti* v. *State* (Tex. Crim. App. 1974), 507 S.W.2d 770, and *State* v. *McGrew* (1974), 127 N.J. Super. 327, 317 A.2d 390 (1974). We find that the conclusion reached in *Aldrighetti*, as quoted below, correctly reflects the scope of *Argersinger*.

---

[1] This number includes the following statutes in which a misdemeanor offense is elevated to a felony upon a second or subsequent conviction as in the present case: Ill. Rev. Stat. 1975, ch. 38, par. 16-5(c) (theft from coin-operated machines), par. 16A-10 (retail theft), par. 22-53 (hypodermic syringes and needles act violations), par. 24-1(b) (unlawful use of weapons), par. 28-1(c) (gambling), par. 28-3 (keeping a gambling place), par. 37-1(b) (maintaining a public nuisance), par. 70-52(b) (inducements to sell or purchase real estate by reason of race, color or religion—prohibition of solicitation violations); ch. 56½, par. 704(c) (possession of cannabis), par. 1406(a), (b) (Controlled Substances Act, miscellaneous violations).

This court has considered similar issues in *People* v. *Placek* (1976), 43 Ill. App. 3d 818, 357 N.E.2d 660, and *People* v. *Heal* (1974), 20 Ill. App. 3d 965, 313 N.E.2d 670. In *Placek*, the defendant contended that the sentencing judge, before imposing a one to three year term in the penitentiary for a current felony offense improperly considered a presentence report violative of defendant's constitutional rights because it listed a prior, uncounseled "shoplifting" conviction for which he had been granted probation for one year. While stating that "[i]t is questionable whether *Argersinger* applies to a misdemeanor which does not, in fact, result in incarceration" (43 Ill. App. 3d 818, 821, 357 N.E.2d 660, 663), the court also acknowledged that a question remained as to the collateral consequences of the prior conviction on defendant's present conviction although he had not been earlier sentenced to imprisonment. This issue was not reached for decision in *Placek* as the matter was resolved on other grounds.

In *Heal*, the defendant contended the sentencing judge improperly considered evidence of his prior traffic convictions in assessing a fine against him for a current traffic conviction in the absence of a showing that he had been represented by counsel at such previous convictions. The court reviewed *Argersinger* and subsequent decisions of our supreme court in *People* v. *Morrissey* (1972), 52 Ill. 2d 418, 288 N.E.2d 397, and *People* v. *Coleman* (1972), 52 Ill. 2d 470, 288 N.E.2d 396, and concluded,

> "It is apparent, therefore, that *Argersinger* is oriented toward cases resulting in a jail or prison sentence and the doctrine of that case should have no application *where no confinement was imposed.* We do not believe it was ever intended to be extended to a traffic case where no incarceration, but only a fine, had been imposed.
>
> Dealing with this point, the Texas Court of Criminal Appeals, in an opinion delivered March 27, 1974, held as follows:
>
> '[P]rior final convictions which are otherwise admissible may be used for the purpose of im-

> peachment or enhancement of punishment even though obtained while the defendant was not represented by counsel and had not waived counsel, so long as the punishment assessed in the prior convictions did not include imprisonment.' *Aldrighetti* v. *State*, 507 S.W.2d 770 at 772.
>
> It is our opinion, therefore, that misdemeanors generally, where no sentence of confinement is imposed, are outside the contemplation of *Argersinger*." *People* v. *Heal* (1974), 20 Ill. App. 3d 965, 968, 313 N.E.2d 670, 672.

While we recognize that *Heal* is factually distinguishable from the present case because the defendant therein was not imprisoned and because his uncounseled prior conviction was applied to a sentencing issue only and not for consideration as an element of a second offense prosecution as in this case, still we find the logic of the court's statements persuasive. They reflect our view that the *Argersinger* prohibition of imprisonment for any offense after an uncounseled conviction was limited in application to a single case in which a defendant was convicted and was not intended to limit the use of a properly obtained, although uncounseled, conviction in future proceedings based upon subsequent conduct of a defendant. We believe this to be true whether such use of the conviction is sought to be made for purposes of impeachment, sentence determination or, as in the instant case, to establish an element of a second or subsequent offense prosecution for which an enhanced penalty might be imposed.

We do not accept defendant's contention that use of his prior, uncounseled theft conviction results either directly or collaterally in imprisonment for that offense. The fact is that he was sentenced to imprisonment for his second theft conviction only and not, as he suggests, sentenced again, and this time to imprisonment, for the first theft conviction. A similar argument to that advanced by defendant was urged in cases arising under the former Habitual Criminal Act (repealed effective January 1, 1964, by Ill. Rev. Stat. 1965, ch. 38, par.

126-1) whereby repeated criminal offenses by a defendant made him subject to enhanced penalties. Our supreme court held that where more severe punishment was imposed under the Act due to prior convictions the punishment was for the new crime only. (*People* v. *Kirkrand* (1947), 397 Ill. 588, 74 N.E.2d 813.) That logic should apply here.

We are further persuaded that should we go beyond the dictates of *Argersinger* and extend its principle to apply in this case there would be little rational reason then why it would not also apply to prohibit enhancement or aggravation of a sentence in such cases where, as in *Heal*, a sentencing judge necessarily considered past criminal conduct of a defendant, or to the use of a lawful, prior uncounseled conviction for purposes of the impeachment of defendant. The United States Supreme Court has not yet determined that the Sixth Amendment requires such extension and we will not do so here.

The defendant also contends the jury was improperly instructed, thus requiring that the felony theft sentence imposed upon him be vacated and the cause remanded for resentencing as a misdemeanor.

The State introduced evidence of both the prior theft conviction we earlier discussed, which was alleged in the information, and also, after defendant testified, introduced a certified copy of defendant's prior armed robbery conviction for purposes of impeachment. The jury was correctly instructed on the elements of the offense of second offense theft, as charged, one element therein being that defendant had previously been convicted of the offense of theft. The jury was also correctly instructed by Illinois Pattern Jury Instructions, Criminal, No. 3.13, that "[e]vidence of the defendant's previous conviction of a crime is to be considered by you only insofar as it may affect his credibility as a witness, and must not be considered by you as evidence of his guilt of the crime with which he is charged." No other instruction relating to the evidence of prior convictions were submitted to the jury.

He argues that if the jury followed the court's instruction contained in IPI Criminal No. 3.13 it could not have considered the former theft conviction (as well as the armed robbery conviction) as evidence of his guilt and, therefore, could not have found a necessary element of the offense charged, *i.e.*, defendant's prior theft conviction, leaving only the current misdemeanor theft alleged in the information to support the verdict of the jury.

We find that defendant has waived any claim of error in the jury instructions by not objecting at the conference on instructions and by failing to raise the issue in his post trial motion. *People* v. *Ahlberg* (1973), 13 Ill. App. 3d 1038, 301 N.E.2d 608; *People* v. *Clark* (1976), 42 Ill. App. 3d 472, 355 N.E.2d 619.

In any event these is no merit to this claim as any error in this regard was, at most, harmless. Evidence of two prior convictions of defendant was introduced at trial, each for a different and limited purpose. A limiting instruction applicable to the armed robbery conviction, introduced for impeachment purposes, was properly given. While we believe a similar limiting instruction designed to clearly differentiate between impeachment and proof of an element of the offense charged should have been given, defendant failed to offer such a limiting instruction to the trial court and will not be allowed to assert on appeal that the jury was not properly instructed. *People* v. *Willis* (1976), 43 Ill. App. 3d 535, 357 N.E.2d 576; *People* v. *Walls* (1965), 33 Ill. 2d 394, 211 N.E.2d 699.

People v. *Edwards* (1976), 63 Ill. 2d 134, 345 N.E. 2d 496, relied upon by defendant, is not applicable to the present case. There a defendant was being tried on an indictment containing separate counts alleging both misdemeanor and felony offenses of unlawful use of weapons. (Ill. Rev. Stat. 1973, ch. 38, par. 24-1(a)(2), (b).) An element of the felony count was that defendant had been convicted of a felony or released from the penitentiary within the past five years. (Ill. Rev. Stat. 1973, ch. 38, par. 24-1(b).) A prior felony conviction of that defendant was introduced in evidence both to establish the necessary element of the felony count being tried and for

purposes of impeachment after he testified. As in the present case, the jury was instructed to consider evidence of prior convictions for impeachment purposes only. The trial court, however, only instructed that jury as to the elements of the misdemeanor count charged and failed to instruct as to the felony count. Clearly, it was error for the trial court to then enter judgment against defendant on the felony count after the jury returned only a general verdict finding defendant guilty of unlawful use of weapons which did not specify whether it was under the felony or misdemeanor count.

No similar confusion exists in the present case and there is no uncertainty as to the determination of the jury. We believe the jurors, in context, understood that the limiting instruction pertaining to impeachment did not prevent them from properly considering the prior theft conviction as evidence of an element of the present offense. Obviously, if they had not done so they would not have returned the guilty verdict as they did.

For the reasons stated herein the judgment of the trial court will be affirmed.

Affirmed.

BOYLE, J., concurs.

Mr. PRESIDING JUSTICE RECHENMACHER, dissenting:

I respectfully dissent. I recognize that the *Argersinger* court directed itself only to cases wherein an uncounseled defendant had been convicted of a criminal offense and was then sentenced to imprisonment for that offense and that conviction. I further recognize that in the instant case the 1975 theft conviction itself was valid under *Argersinger* because, while the defendant was not represented by counsel at trial, he also was not imprisoned following his conviction. However, I do not agree with the majority when they say the *Argersinger* court "carefully limited its holding to a conviction and the sentence imposed for that conviction."

I would analyze the broad "*Argersinger* problem" by breaking *Argersinger*-type cases down into four classifications:

(1) Uncounseled misdemeanor convictions; under *Argersinger* no jail sentence can be imposed unless defendant has counsel, or knowingly waives counsel.

(2) Cases like the instant case, where a defendant is subject to much more severe penalties in a subsequent case because of an earlier, uncounseled misdemeanor conviction. Imprisonment in such cases would be increased as a direct consequence of the earlier, uncounseled conviction.

(3) Cases similar to *People* v. *Heal* (1974), 20 Ill. App. 3d 965, wherein the court considers prior, uncounseled convictions that are contained in a presentence report. Although *Heal* did not really involve the *Argersinger* problem (since no jail sentence was imposed), the court's citation of *Aldrighetti* v. *State* (Tex. Crim. App. 1974), 507 S.W.2d 770, in the context of the use of the pre-sentence report, implies that prior, uncounseled misdemeanor convictions can be considered by the court in imposing sentence. Certainly this is the view of *Heal* which both the State and the majority take.

(4) Cases like *Aldrighetti* v. *State* wherein the court approved the introduction of an earlier, uncounseled conviction for impeachment purposes. As noted, *Aldrighetti* was cited with approval in *Heal*.

Each one of the last three classes of cases present wholly different policy considerations, and a holding on a point (in one type of case) is thus distinguishable from a holding on a point involving one of the other types of cases. Thus, for example, in the instant case, proof of the prior, uncounseled conviction is an element of the State's case in chief and can only be proven through competent evidence, whereas for policy reasons, hearsay can be introduced in presentence reports or at a sentencing hearing, such as was at issue in *Heal*. Therefore, assuming the court approved the use of uncounseled convictions for impeachment and sentencing in *Heal*, in view of the different policy considerations that arise when the prior conviction is an element of the case in chief, *Heal* is no authority for the introduction of the earlier conviction in this case.

Further, in the instant case, two years of (potential) extra imprisonment are the direct result of the earlier conviction. In the *Aldrighetti* case, where the misdemeanor was introduced for impeachment purposes, the link between the prior conviction and the defendant's imprisonment was quite remote, or even speculative; it was impossible to state that, "but for" the earlier conviction, the defendant would not have gone to jail, or would have received a lesser sentence. The same can be said in the *Heal* context, though to a lesser extent, since sentencing involves the court's discretion, and prior convictions are but one factor in the exercise of that discretion. Clearly, in the instant case, imprisonment is a far more direct consequence of the use of the earlier conviction than would be the case in cases involving either impeachment or presentence reports.

In my opinion, it follows from these distinctions that a holding in this case, precluding the introduction of an uncounseled conviction as an element of the State's case in chief, leading directly to enhanced punishment, would not preclude the introduction of such convictions for impeachment, or in presentence reports. Thus, the holding here would only arise in convictions where the statute

provides for an enhanced penalty upon a second conviction.

Turning to the primary question of whether uncounseled convictions can be used in this specific class of cases, it is my thought that the question should be answered in the negative. This court, and others, has held that *Argersinger* should be applied to invalidate prior convictions where "*the direct or collateral consequences* from uncounseled misdemeanor convictions relate to loss of liberty or imprisonment." (Emphasis added.) (*People* v. *Placek* (1976), 43 Ill. App. 3d 818, 821.) Here, the direct consequence of the uncounseled misdemeanor conviction was an extra two years added to the defendant's maximum sentence. On this basis, it seems to me that the instant case falls within *Argersinger* and should be reversed and remanded for resentencing as a misdemeanor.

NOTIFICATION OF DENIAL OF PETITION FOR LEAVE TO APPEAL BY SUPREME COURT OF ILLINOIS

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62706
(217) 782-2035

November 23, 1977

State Appellate Defender
Second Judicial District
63 Douglas Street
Elgin, Illinois 60120

No. 50059—People State of Illinois, respondent, vs. Thomas Baldasar, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

SUPREME COURT OF THE UNITED STATES

No. 77-6219

THOMAS BALDASAR, PETITIONER

v.

ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO the Appellate Court, Second District Court of the State of Illinois.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 19, 1979

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